Office-Supreme Court, U.S.
FILED
JUL 6 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NORTH HAVEN BOARD OF EDUCATION

and

TRUMBELL BOARD OF EDUCATION,

Petitioners,

v.

TERREL H. BELL, SECRETARY OF EDUCATION

and

DEPARTMENT OF EDUCATION

and

LINDA POTZ,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

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BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

The Equal Employment Advisory Council (EEAC), with the written consent of all parties, respectfully submits this brief as Amicus Curiae in support of the Petitioners.[1]

[1] Their consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary, nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Although most of EEAC's members are not directly subject to the provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* (Title IX), the Court's decision in this case can be expected to bear importantly on employers such as EEAC's members that are subject to other similar statutory provisions. Thus, for example, many of EEAC's members participate in federally subsidized programs of various types and therefore are subject to Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (Section 504)—a statute which, like Title IX, was modeled after Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* Accordingly, EEAC's members have a substantial interest in the issue presented for the Court's consideration, that is, whether the nondiscrimination provisions of Title IX extend to the general employment practices of recipients of federal financial assistance where the intended beneficiaries of that assistance are not employees.[2]

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[2] Because of its interest in issues arising out of Title IX and Section 504, EEAC filed briefs as Amicus Curiae in the Court in *Southeastern Community College v. Davis*, 99 Sup. Ct. 2361 (1979); *Cannon v. University of Chicago*, 99 Sup. Ct. 1946 (1979); and *University of Texas v. Camenisch*, 49 U.S.L.W. 4468 (U.S. April

SUMMARY OF ARGUMENT

Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* (Title IX), was modeled after Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* (Title VI), and uses identical words to define the scope of its jurisdiction. The court below placed inappropriate weight, however, on the fact that clarifying language similar to that found in Section 604 of Title VI—stating that Title VI applies to employment practices only if employees were the intended beneficiaries of federal funds—was deleted from the House version of Title IX when the House and Senate bills were in Conference.

The Second Circuit was incorrect for several reasons. First, the language of Section 901 is limited, on its face, to the intended beneficiaries of federal assistance and does not include employees in general. *Islesboro School Committee v. Califano*, 593 F.2d 424 (1st Cir. 1979). Second, and more importantly, the legislative history of Section 601 of Title VI, upon which Section 901 was modeled, indicates that Section 601 was to be limited in coverage to intended beneficiaries of the federal program. Section 604, which permits coverage of only those employees who were the intended beneficiaries of the program, merely clarified the intent of the writers of Section 601. Its inclusion in Title VI, therefore, was unnecessary and the scope of Title VI would not have been changed had Section 604 been omitted. Thus, in view of the established meaning of Section 601, it was not necessary that the statute contain an affirmative statement that it excluded employment practices from its ambit. This con-

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29, 1981). On numerous other occasions, EEAC has filed briefs amicus curiae in this Court on other significant equal employment issues. *See, e.g., Int'l Bro. of Teamsters v. United States*, 431 U.S. 324 (1977); *United Airlines v. Evans*, 431 U.S. 553 (1977); *Great American Federal Savings & Loan Ass'n v. Novotny*, 99 Sup. Ct. 2345 (1979); and *Texas Department of Community Affairs v. Burdine*, 101 Sup. Ct. 1089 (1981).

clusion is reinforced by the fact that the House Committee considering Title IX failed to adopt a Justice Department proposal which would have applied Title IX to discriminatory employment practices in general, and later, the Senate rejected a version of Title IX introduced by Senator McGovern which would have expanded the bill specifically to include employment practices.

Third, the Senate version of Title IX was derived from the House bill, which was, in part, a marked up copy of Title VI. Moreover, the legislative history of Title IX in both the House and Senate clearly demonstrates that it was divisible into two parts: (1) those nondiscrimination provisions relating to the intended beneficiaries of financial assistance, and (2) those relating to discrimination in general employment practices which were to be regulated under Title VII of the 1964 Civil Rights Act (Title VII) and the Equal Pay Act. To have included beneficiary employees within the protection of Section 901 would have been inconsistent with the overall structure of Title IX.

HEW's Title IX regulations covering general employment practices, moreover, are inconsistent with the program specific scope of Section 901 and the pinpoint termination procedures of Section 902 in that the regulations encompass employees who are not necessarily intended beneficiaries of financial assistance. Importantly, this Court in *Cannon v. University of Chicago*, 99 Sup. Ct. 1946, 1955 (1979), in finding a private right of action under Title IX, did so based on a recognition of Title IX's "unmistakable focus on the benefited class" rather than "a ban on discriminatory conduct by recipients of federal funds."

Finally, the Court should not be persuaded by the government's argument below that employment discrimination that somehow assertedly "infects" the rights of student beneficiaries can be relied upon to expand the coverage of the plain meaning of the statute to cover general employment practices. The complaints did not allege that the complainants were the intended beneficiaries of

federal assistance or even that they were employed in federally funded programs for the benefit of students. Also, the isolated employment discrimination alleged does not affect student beneficiaries, and the government's assertion to the contrary is inappropriately raised in this case. Further, the language of the Department of Health, Education and Welfare (HEW)[3] regulations at issue does not establish an infection doctrine, and it would be inappropriate for the Court to read into those regulations a broader meaning than the express words and intent of the agency when it promulgated them.[4] *Romeo Community Schools v. HEW*, 438 F.Supp. 1021, 1034 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir. 1979), *cert. denied*, 444 U.S. 972 (1979).

ARGUMENT

I. SECTION 901 OF THE EDUCATION AMENDMENTS OF 1972 DOES NOT AUTHORIZE THE DEPARTMENT OF EDUCATION TO REGULATE THE GENERAL EMPLOYMENT PRACTICES OF RECIPIENTS OF FEDERAL FINANCIAL ASSISTANCE.

Although written broadly, Section 901, 20 U.S.C. § 1681, addresses itself only to sex discrimination against the participants and the beneficiaries of federally assisted programs. The discrimination prohibition is stated unequivocally and unambiguously:

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[3] HEW's functions under Title IX were transferred to the Department of Education by Section 301(a)(3) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 677, 678. For purposes of editorial simplicity, this brief will refer to HEW throughout since the relevant actions were taken by HEW prior to the reorganization.

[4] At the time of the decision of the trial court, HEW's Title IX employment regulations appeared at 45 C.F.R. Part 86, Subpart E, §§ 86.51-86.61. They were recodified in connection with the establishment of the Department of Education, 45 Fed. Reg. 30802, 30962-64 (May 9, 1980), and ultimately will be found at 34 C.F.R. Part 106, Subpart E.

> No person in the United States shall, on the basis of sex, be excluded from participation, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

The wording chosen by Congress makes unmistakably explicit that Section 901 is designed to protect from sex discrimination only those persons for whose benefit the federally funded programs are established. *Brunswick School Board v. Califano*, 449 F. Supp. 866, 870 (D. Maine 1978), *aff'd sub nom. Islesboro School Committee v. Califano*, 593 F.2d 424 (1st Cir. 1979); and *Romeo*, 438 F. Supp. at 1031. It does not by its terms regulate the general employment practices of recipients in circumstances in which employees are not the intended beneficiaries of federal monies.

The Second Circuit erroneously concluded, however, contrary to every other court of appeals and district court that has considered the validity of Subpart E of HEW's Title IX regulations, that Title IX's legislative history supported HEW's regulation of the general employment practices of recipients.[5] But in examining the legislative history to determine the jurisdictional scope of Title IX, the court of appeals overlooked the legislative history of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* (Title VI), as the source for establishing the meaning of the identical words in Title IX. It also failed to recognize and place proper weight on the chronological development of the final version of Title IX of the Education Amendments of 1972, Pub. L. 92-318, 86 Stat. 373 *et seq.*, which clearly shows that the House Title IX bill—the development of which preceded the Senate bill by several months—was the primary source of the enacted language. It was therefore inappropriate for the court below to have relied on the am-

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[5] See the court decisions cited in Pet. for Cert. 5-8.

biguous legislative history of the Senate bill as being determinative of the meaning and scope of Title IX.

As this Court recognized in *Cannon v. University of Chicago*, 99 Sup. Ct. 1946, 1956 & n. 16 (1979), Title IX was modeled after Titie VI. The description of the benefited class in Section 901 of Title IX is identical to that in Section 601 of Title VI, 20 U.S.C. § 2000d, except that the word "sex" is substituted for the words "race, color, or national origin" found in Title VI. *Id.* at 1956-57. Both statutes, moreover, adopt the same administrative scheme for terminating federal financial assistance "in the particular program, or part thereof" in which discrimination of intended beneficiaries by the recipient institution is found. *Compare* 20 U.S.C. § 1682 *with* 42 U.S.C. § 2000d-1. The only difference between the two statutes is the omission from Title IX of the following language found in Section 604 of Title VI, 42 U.S.C. § 2000d-3 (hereafter "Section 604" language):

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any practice of any employer, employment agency, or labor organization *except where a primary objective of the Federal financial assistance is to provide employment.* (Emphasis added.)

But as virtually all courts except the Second Circuit have held, the legislative histories of Titles VI and IX clearly establish that the deletion of the Section 604 language from the House version of Title IX in the Conference Committee did not expand the scope of Section 901 to include employees who are not the intended beneficiaries of federal assistance or who are employed simply to assist in the delivery of benefits to the intended beneficiaries.

A. The Legislative History of Section 601 of Title VI, From Which Section 901 of Title IX Was Derived, Shows That Even Without Section 604's Language Limiting the Employment-Related Scope of Title VI, Section 601 Did Not Encompass Employees Unless They Were the Intended Beneficiaries of Financial Assistance.

As stated above, both Title VI and Title IX use the same words in Sections 601 and 901 to describe their coverage. Since the words used in Section 901 are derived from Title VI, their meaning as reflected in Title VI's legislative history is relevant in determining the scope and meaning of Section 901. *See Cannon*, 99 Sup. Ct. at 1956 n. 16 ("The genesis of Title IX also bears out its kinship with Title VI").

In the original Administration bill proposing the Civil Rights Act of 1963, Section 601 of Title VI included a provision prohibiting employment discrimination in programs receiving federal assistance.[6] Subsequently, during the summer of 1963, the Administration drafted a new version of the Civil Rights Act containing the language now found in Section 601, which did not expressly provide that Title VI extended to employment practices. All provisions relating to employment, however, were placed in an expanded Title VII.[7] *Even before Section 604 was added to Title VI*, both Houses of Congress and the Justice Department understood that this revision of Title VI was intended to protect only beneficiaries of federal programs, but not those employed to provide those benefits.[8] Indeed, in a letter in response to a specific question

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[6] *See* S. 1731, 88th Cong., 1st Sess. (1963), *as reported in Cannon*, 99 Sup. Ct. at 1956 n. 14.

[7] H.R. 7152, 88th Cong., 1st Sess. (1963).

[8] *See Hearings on S. 1731 and S. 1750 Before the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. (1963) (hereafter *Senate Judiciary Committee Hearings*) at 331, 335 (remarks of Sen. Ervin); *Hearings on H.R. 7152 Before the House Comm. on the Judiciary*, 88th Cong., 1st Sess. (1964) (hereafter *House Judiciary*

on this point from Senator Cooper, Attorney General Robert Kennedy, the Administration's primary spokesman on the Civil Rights Act, stated:

> 3. Question. Would section 602 cover an employer who receives funds under a Federal program and who discriminates in his employment practices?
>
> Answer. Generally no. Title VI is limited in application to instances of *discrimination against the beneficiaries* of Federal assistance programs as the language of section 601 *clearly* indicates. Where, however, employees are the *intended* beneficiaries of a program, Title VI would apply. Thus, for example, creation of job opportunities is one of the major purposes of the accelerated public works program. Hence construction employees would be deemed beneficiaries of such a program and section 602 would require the administering agency to take action to prohibit racial discrimination against them in such a program. On the other hand, the Agricultural Adjustment Act and acreage allotment payments under it is a commodity program having nothing to do with farm employment. Farm employees are not beneficiaries of that program, and section 602 would not authorize any action to require recipients of acreage allotments to refrain from racial discrimination in employment. (Emphasis added.)

110 Cong. Rec. 10076 (1964).

Notwithstanding these clear and unequivocal statements of Administration representatives and other proponents

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Committee Hearings) at 2685 (testimony of Attorney General Kennedy), 2774 (letter from Deputy Attorney General Katzenbach to Rep. Celler); *Hearings on H.R. 7152 Before the House Comm. on Rules*, 88th Cong., 2d Sess. (1964) (hereafter *House Rules Committee Hearings I*) at 141, 198, 200 (remarks of Rep. Celler), 228-230 (remarks of Rep. McCulloch); 110 Cong. Rec. 1518-19 (1964) (remarks of Rep. Celler); *id.* at 1602 (remarks of Rep. Mathias); and *id.* at 10076 (letter from Attorney General Kennedy to Sen. Cooper).

of the Civil Rights Act that Title VI did not apply to employment except in the limited circumstance where employees are the *intended* beneficiaries of a program, at least one opponent of Title VI construed its words to include both employees as well as beneficiaries.[9] Thus, when the Senate began consideration of H.R. 7152 (which had passed the House of Representatives), in order to clarify the intended meaning of the House bill, the Dirksen-Mansfield substitute (which eventually became the Civil Rights Act of 1964) was offered to improve upon the draftsmanship of the House bill.[10] Consistent with the objectives of making "a number of points clearer and more specific" and "express[ing] in specific legislative language what always has been intended",[11] Section 604 was added. As noted by Senator Humphrey, the Senate floor leader for the Civil Rights Act:

> We have made no changes of substance in title VI. . . . We have made several minor adjustments and, in addition, we have modified the language to make explicit the declared intention of this title.[12]

With respect to the new Section 604, he stated that: "This provision is in line with the provisions of section 602 and serves to spell out more precisely the declared scope of coverage of the title." [13]

Thus, Section 604 merely made clear what always had been intended by the words in Section 601 that "[n]o person . . . shall . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any [federally assisted] program or activity."

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[9] *See House Rules Committee Hearings 1* at 379-80 (remarks of Rep. Poff); and 110 Cong. Rec. 2484-85 (1964) (remarks of Rep. Poff).

[10] 110 Cong. Rec. 12707 (1964) (remarks of Sen. Humphrey).

[11] *Id.*

[12] *Id.* at 12714.

[13] *Id.* at 12720. *See also Hearings on H.Res. 789 Before the House Committee on Rules*, 88th Cong., 2d Sess. (1964) at 6, 7 (testimony of Rep. Celler).

That is, Section 601 covers intended beneficiaries under such programs but does not encompass persons employed in connection with such programs unless the primary purpose of the federal assistance is the creation of jobs. *See Ass'n Against Discrimination v. City of Bridgeport*, 25 EPD ¶ 31,714 at p. 20,101 (2d Cir. 1981).[14] The legislative history of Title VI clearly demonstrates, therefore, that the presence or absence of Section 604 in Title VI was superfluous in determining the scope and meaning of Section 601.[15]

Because the language defining the scope of Section 901 is derived from Section 601,[16] the applicability of Title IX to general employment practices is the same as under Title VI unless the legislative history of Title IX shows a clear and unambiguous legislative intent to the contrary. Even though Title IX does not contain express language equivalent to Section 604, a review of its legislative history does not reveal any intent to change the meaning of the words in Section 601 which also define the jurisdictional scope of Title IX.

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[14] *See also Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1235 (7th Cir. 1980); and *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672, 674 (8th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3251 (U.S. 1980) and the Title VI legislative history cited therein. Both appeals courts found that the legislative history of Title VI lends strong support to the conclusion that Congress did not intend protection under Title VI to any person other than an intended beneficiary of federal financial assistance. And *see United States v. Cabrini Medical Center*, 639 F.2d 908 (2d Cir. 1981); and *Trageser v. Libbie Rehabilitation Center*, 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 977 (1979).

[15] *See* pp. 8-10 & n. 8, *supra*.

[16] *See Cannon*, 99 Sup. Ct. at 1956 n. 16.

B. The Legislative History of Title IX Shows That Congress Intended To Give the Same Meaning to the Words in Section 901 As Are Contained in Section 601 of Title VI.

The genesis of Title IX was in hearings in 1970 on Section 805 of H.R. 16098.[17] As proposed, Section 805 would have: (1) added the word "sex" to the forms of discrimination prohibited in Section 601 of Title VI (Section 805(a)); (2) amended Title VII of the Civil Rights Act of 1964 to remove the exemption for those employed in educational institutions (Section 805(b)); (3) amended the Civil Rights Act of 1957, 42 U.S.C. 1975c, to extend the jurisdiction of the Civil Rights Commission to include sex discrimination (Section 805 (c)); and (4) amended the Equal Pay Act to remove the exception for executive, administrative and professional personnel (Section 805(d)).[18]

Thus, like the legislative package of nondiscrimination provisions relating to educational institutions that was finally enacted as Title IX, Section 805 was a multi-part bill designed to address both sex discrimination in employment (Section 805(b) and (d)) and sex discrimination occurring with respect to the intended beneficiaries of federal financial assistance (Section 805(a)). Since the latter involved an amendment to Title VI, *Section 604 would have also applied.* Indeed, most of the testimony offered in support of Section 805 related to sex discrimination in employment in educational institutions, particularly at the university level. Each witness who testified regarding employment discrimination did so referencing the employment provisions of the bill, that is, those

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[17] *See Hearings on Section 805 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. (1970) (hereafter *House Title IX Hearings*).

[18] Section 805(a) later became Sections 901 to 903 in the enacted Title IX; Section 805(b) became Section 906; Section 805(c) was subsequently dropped; and Section 805(d) became Section 908.

amending Title VII and the Equal Pay Act.[19] No witness tied the amendment of Title VI to employment, except to the extent that employment was the primary purpose of federal assistance, and those witnesses who discussed the applicability of Section 805(a), including the HEW witness, did so only in the context of that provision's protection of student beneficiaries.[20]

The Justice Department, moreover, testified that it could not support the legislation in the form then under consideration, but suggested an alternative that would have provided HEW jurisdiction over employment practices. Under its proposal, Title VI, Title VII and the Equal Pay Act would not have been amended. Instead, a new statute would have been enacted containing language virtually identical to that in Section 601 of Title VI but specifically providing for jurisdiction over employment activities associated with those programs.[21] Thus, in view of the unambiguous legislative history concerning the meaning and scope of Section 601 which it had had a major part in drafting, the Justice Department recognized that Section 601 did not include coverage of employees except with respect to federally subsidized jobs programs, and that jurisdiction over the general employment practices of recipients required an explicit provision providing for such coverage.

Subsequently, in early 1971, without any expressed intent to change the purpose of H.R. 16098 or the meaning of the words in Section 601, the House Education and Labor Committee "marked up" a copy of Title VI as part of the bill later re-introduced as H.R. 7248 in the Ninety-Second Congress—the House version of the bill eventually enacted as Title IX.[22] In doing so, con-

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[19] *See House Title IX Hearings* at 8-9, 27, 79, 128, 154, 159, 304-305, 379, and 452-53.

[20] *Id.* at 210-11, 305-06, 379, 750.

[21] *Id.* at 678-91.

[22] H.R. 7248, 92d Cong., 1st Sess. (1971) *as reported in* H.R. Rep. No. 92-554, 92d Cong., 1st Sess. (1971). The section numbers

sistent with the Committee's intent that the sex discrimination title would not encompass employment discrimination in federally funded programs except in limited circumstances, the Section 604 language was included as Section 904.[23] As a matter of legislative draftsmanship its inclusion was faulty because H.R. 7248 also included express prohibitions against sex discrimination in the general employment practices of educational institutions by its amendments to Title VII of the Civil Rights Act of 1964 and the Equal Pay Act.[24] The application of neither of these statutes, of course, is limited to employees who are intended beneficiaries of federal funds and the legislative history of Title IX evidences no intent that these amendments were to create such a limitation.

Given the unequivocal meaning of the "no person" language in Section 601 of Title VI, discussed above,[25]

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in both the House and Senate bills were numbered 1001 *et seq.* because the sex discrimination title was then numbered Title X. For purposes of clarity, the section numbers used herein are keyed to the enacted section number, *i.e.*, section 1001 becomes section 901 *et seq.*

[23] Congressman O'Hara subsequently testified in oversight hearings reviewing HEW's Title IX regulations that the reason the Committee drafted a new statute with identical language to Title VI instead of simply amending Title VI was concern that it would open Title VI to hostile amendments as well as the concept it was seeking to extend in the proposed Title IX. "So, to protect the substance of Title VI from hostile amendment, the committee instead wrote a statute embodying the words of Title VI, but substituting the word 'sex' for the word 'race.'" *Hearing on H. Con. Res. 330 Before the Subcomm. on Equal Opportunities of the Comm. on Education and Labor*, 94th Cong., 1st Sess. (1975) (hereafter *Hearing on H. Con. Res. 330*) at 7 (testimony of Rep. O'Hara). Congressman O'Hara also testified: "In the course of the process, certain exceptions were made, largely at the insistence of certain prestigious private colleges and universities, but otherwise *the language and method of Title IX is the language and method of Title VI.*" *Id.* at 8 (emphasis added).

[24] *See* Sections 906 and 908 of H.R. 7248.

[25] *See* pp. 8-11, *supra.*

the inclusion or exclusion of the "Section 604" provision simply does not alter Congress' intent to limit the prohibition against sex discrimination under Sections 901 to 903 of Title IX to intended beneficiaries of federal financial assistance.[26] Clearly then, with or without "Section 604" language, the House version of Title IX was divisible into two parts: (1) those provisions addressing discrimination in general employment practices (Sections 906 and 908), and (2) those provisions addressing discrimination against intended beneficiaries of federal assistance (Sections 901 to 903).

Furthermore, the legislative history regarding the Senate's version of Title IX does not undercut this conclusion in the face of the established meaning of the words found in Section 901, the testimony in the *House Title IX Hearings*, and the intent of the House as reflected in H.R. 16098 as substituted by H.R. 7248. The court below relied almost totally on the ambiguous legislative history of Title IX in the Senate, principally the remarks of Senator Bayh, in construing the scope of Title IX. In doing so, the court of appeals ignored the fact that the words used in Sections 901 to 903 of Title IX are derived from Title VI and that Title VI was the basis of the House bill.

The evolution of the Senate's version of Title IX involved a succession of two different proposals by Senator Bayh. The first—introduced in August 1971—was substantially different from Title IX as enacted, and the Second Circuit's reliance on it to support its conclusion

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[26] In justifying the application of its Title IX regulations to employment, HEW has characterized Section 604 of Title VI as exempting employment under Title VI. *See, e.g., Hearing on H. Con. Res. 330* at 31 (testimony of Gwendolyn Gregory). Section 604, however, is not properly characterized as an "exemption"; rather it simply clarified the meaning of Section 601. More importantly, removal of a negative concept does not operate affirmatively to confer authority where it does not otherwise exist, as the Justice Department substitute for Section 805 of H.R. 16098 recognized. See p. 13, *supra*. In the context of Title IX, the excluded institutions listed in Section 901 constitute the exemptions from coverage.

that Title IX encompasses general employment practices is ill-founded. First, although Senator Bayh stated that "[t]hese provisions are identical to those provided under Title VI of the 1964 Civil Rights Act," (117 Cong. Rec. 30156), a comparison of his amendment and Title VI shows that the scope of his proposal was institutional rather than program specific, and unlike Title VI the proposal contained no pinpoint termination provision.[27] Second, and more significantly, unlike Senator Bayh's second proposal and Title IX as enacted, the first proposal did not include amendments to Title VII and the Equal Pay Act which encompass employment discrimination. Indeed, it is significant to note, as this Court did in *Cannon* that (at the time the first Bayh proposal was being considered), "[i]n adopting Title IX in its present form, in fact, Congress passed over an alternative proposal, offered by Senator McGovern . . . that was phrased quite differently. . . ." 99 Sup. Ct. at 1955 n.14. That amendment used language nearly identical to Section 601 of Title VI but modified it by explicitly providing for jurisdiction over the general employment practices of recipients of federal assistance.[28] Thus, like the Justice Department substitute to Section 805 of H.R. 16098, Senator McGovern recognized that, in order for Title IX to include the employment practices of recipients, express provision needed to be made for it.[29]

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[27] *Compare* 20 U.S.C. § 2000d-1 *et seq.* with S.659 at 117 Cong. Rec. 30404 (1971).

[28] 117 Cong. Rec. 30411. In relevant part the McGovern proposal provided:

> No person in the United States shall be excluded on the grounds of sex from participation in, be denied the benefits of, be subjected to discrimination under *or be denied employment in connection with any program or activity assisted under this Act.* (Emphasis added.)

[29] With no express provision in the first Bayh proposal to show that it encompassed general employment practices, the legislative history associated with it is at best ambiguous as to whether it covered employment. For example, in response to a question from Senator Dominick concerning the meaning of Section 601, Senator

Subsequently, Senator Bayh made a second proposal in February 1972 that *expanded* his first proposal, thereby closely conforming it to H.R. 7248, which had been reported out of the House Education and Labor Committee in October 1971.[30] Thus, while the language of Senator Bayh's first proposal deviated from the actual wording of Title VI, his second amendment, like the House bill, was identical to the first three sections of Title VI. Moreover, like the House bill, it now contained amendments to the employment discrimination provisions of Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, and amended the Civil Rights Act of 1957. The fact that Senator Bayh's second proposal did not contain "Section 604" language was not a real difference between the House and Senate bills.

As discussed above, inclusion of "Section 604" language in the House Title IX bill was unnecessary and in fact inconsistent with the overall structure of the proposed statute. More significantly, there is nothing in Senator Bayh's floor statements that directly shows that he intended the "Title VI" provisions of his second proposal to encompass employees. Indeed, in summing up the reasons why the Senate should adopt his proposal, Senator Bayh stated:

> When I proposed an amendment similar to this last August it was ruled "nongermane." *Now I am coming back to the Senate with this comprehensive approach which incorporates not only the key provisions of my earlier amendment, but the strongest points of the antidiscrimination amendments approved by the House.*

118 Cong. Rec. 5808 (emphasis added).[31] Senator Bayh

Bayh stated: "What we are trying to do is provide equal access for women and men students to the educational process and the extracurricular activities in a school . . . ." 117 Cong. Rec. 30407 (remarks of Senator Bayh).

[30] *See* pp. 13-15, *supra*.

[31] The Second Circuit's analysis of the legislative history of Title IX, therefore, is flawed because it treats as of secondary

thereby made clear the proper basis for the derivation of the meaning and structure of his amendment.

Consequently, the only logical and proper construction of his bill is that it was, like its counterpart in the House, divisible into two parts: (1) those Title VI-related provisions addressing students as intended beneficiaries of financial assistance, and (2) those provisions addressing employment discrimination under Title VII and the Equal Pay Act in which considerations of whether there has been federal financial assistance are irrelevant. When viewed in context, a fair reading of Senator Bayh's remarks introducing his bill, the synopsis of his bill, and the colloquy between Senators Pell and Bayh discussing the bill shows that Senator Bayh "continuously broke down the amendment into separate categories, certain of them dealing with students (Title IX) and others dealing with employees (Title VII and the Equal Pay Act)." [32] *Islesboro School Committee v.*

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importance the House's consideration of Title IX. As the discussion herein and Senator Bayh's statement show, the House bill, H.R. 7248, and the hearings leading to it preceded and established the parameters of the Senate's consideration of Title IX.

[32] *See generally* 118 Cong. Rec. 5803-5813. More particularly: (1) his prepared statement divided the rationale for his bill between discrimination in hiring and promotions and discrimination in admissions and scholarship (*id.* at 5804-5806); and (2) his prepared summary of the bill distinguished between the provisions relating to admissions and those relating to employment (*id.* at 5707-08). His introductory statement (*id.* at 5803) and colloquy with Senator Pell (*id.* at 5812-5813) do not indicate a contrary intent. While the court below construed those remarks as arguing for an overlap in the employment discrimination provisions, his statement that "[c]entral to my amendment are sections 1001-1005" (*id.* at 5807)—Section 1005 being the amendment to include educational institutions under Title VII—clearly demonstrates that Senator Bayh's references to employment discrimination are references to section 1005 rather than the prohibitions in federally assisted programs. *See also Romeo*, 438 F. Supp. at 1030 ("Senator Bayh's quoted assertion of employment discrimination coverage by Title IX in his remarks during introduction of this bill was made in reference to the entire Title IX legislative package including the Title VII and Equal Pay Amendments.").

Califano, 593 F.2d at 427, *cert. denied*, 444 U.S. 972 (1979). Any other construction of the legislative history is inconsistent with the step-by-step development of Title IX of the Educational Amendments of 1972, shown above.

Thus, the court below erred when it concluded, in contrast to every other federal court including the trial court herein, that the need to avoid inconsistency with the comprehensive employment discrimination provisions in Title VII and the Equal Pay Act was an insufficient explanation for the deletion of Section 904 (the "Section 604" provision) from the House bill in Conference. In fact, in view of the development and structure of both the House and Senate bills and the established meaning of the words in Section 901, it is the only logical explanation.

The Second Circuit reached its erroneous conclusion based on its feeling that Congress easily could have drafted an employment exclusion applicable to Sections 901 to 903. As the proposals of the Justice Department and Senator McGovern illustrate, the well-established meaning and scope of Section 601 of Title VI (as well as the intent of the framers of H.R. 7248) necessitated that employment coverage in federally assisted programs be expressly provided for, not expressly excluded.[33]

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[33] For these reasons, the court of appeals' conclusion, that some evidence that employment coverage was intended as shown by the failure of Congress to adopt bills and amendments specifically designed to exempt employment from HEW's regulations, is equally erroneous. Likewise, the failure of Congress to disapprove HEW's Title IX regulations should not be taken as any indication of their validity. For, 20 U.S.C. § 1232 expressly provides that failure of Congress to disapprove regulations promulgated by HEW is not evidence of approval and creates no presumption of validity. Moreover, whereas Title IX was considered and voted on by the entire Congress, hearings before a committee of Congress reviewing regulations hardly constitutes a statement of Congress' intent when it enacted Title IX. *Cf. Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190 (1978) (Repeal of acts of Congress by implication are

In sum, Congress provided separate statutes with separate remedies for the protection of intended beneficiaries of federal programs (Title IX) and the protection of employees (Title VII and the Equal Pay Act). Accordingly, only if students as direct beneficiaries are being excluded from participation in a federally assisted program, denied the benefits thereof, or subjected to discrimination under it, and if corrective efforts fail, may the funds to that program be cut off. Cutting off funds for employment-related allegations of discrimination would serve only to deprive innocent student beneficiaries of the educational services the Congress intended them to have, without remedying the alleged discrimination suffered by the employee. Such a result would be particularly anomolous since the sanction is not being imposed for the purpose of protecting the beneficiary's rights. In any event, if an employee has suffered discrimination, she is fully entitled to the employment-related remedies available under Title VII and the Equal Pay Act.

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not favored especially where such an implication is based on committee action).

Furthermore, the Second Circuit's reliance (629 F.2d at 782) on a summary of the requirements of Title IX by Dr. Bernice Sandler, one of the proponents of Title IX, placed in the Congressional Record one month *after* the Higher Education Amendments of 1972 containing Title IX were enacted into law, constitutes post-enactment legislative history to be accorded little weight. *See Intl. Bro. of Teamsters v. United States*, 431 U.S. 324, 354 n. 39 (1977). More importantly, when Dr. Sandler testified before Title IX was enacted with respect to Section 805 of H.R. 16098, she indicated her understanding that the provision amending Title VI to cover sex discrimination in federal programs would have no application to employment practice, but was intended to protect students. *House Title IX Hearings* at 305-06.

II. THE APPLICATION OF SECTION 901 TO THE GENERAL EMPLOYMENT PRACTICES OF RECIPIENTS IS INCONSISTENT WITH ITS PROGRAM SPECIFIC SCOPE AND THE PINPOINT TERMINATION PROVISIONS OF SECTION 902.

A. Section 901 Is Program Specfic and, Therefore, Protects Only the Intended Beneficiaries of Federally Funded Programs and Activities From Discrimination on the Basis of Sex.

Although Title IX prohibits sex discrimination in any "education program and activity receiving Federal financial assistance," 20 U.S.C. § 1681, HEW broadly construes its authority to include regulating all employment practices even in circumstances in which the program does not receive federal funds and employees are not intended beneficiaries. This Court stated, however, in finding a private right of action under Title IX in *Cannon:*

> There would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX *with an unmistakable focus on the benefited class*, had written it simply to a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices. (Emphasis added, footnote omitted.)

99 Sup. Ct. at 1955. In doing so, this Court recognized the program specific nature of the benefited class under Title IX, as well as the inapplicability of Title IX to the general employment practices of recipients unless employees are the intended beneficiaries. Indeed, in *Cannon* the Court specifically found that the "petitioner [student applicant] is clearly a member of that class for whose *special* benefit the statute was enacted." *Id.* at 1956 (emphasis added).

This construction of the program specific scope of Section 901 is confirmed by the legislative history of Title VI, from which the "program and activity" lan-

guage is derived. During the debates on the 1964 Civil Rights Act, concern was continually expressed that Title VI would permit intervention into every aspect of the operations of recipients. In response to those concerns, Title VI was redrafted to make it program specific, and the floor statements in both Houses confirm this intent.[34] Moreover, in response to a request from Representative Celler, chairman of the House Judiciary Committee, concerning a list of programs and activities involving federal financial assistance within the scope of H.R. 7152 (which was later given greater specificity in section 601 of the Dirksen-Mansfield substitute), Deputy Attorney General Katzenbach stated:

> The impact of title VI is further limited by the fact that it relates only to participation in, receipt of benefits of, or discrimination under, a federally assisted program. As to each assisted program or activity, therefore, title VI *will require an identification of those persons whom Congress regarded as participants and beneficiaries, and in respect of whom the policy declared by Title VI would apply.*

House Judiciary Hearings at 2774.

Witnesses testifying during the Title IX hearings also understood that "program or activity" applied to the direct beneficiaries of programs funded under specific grant statutes.[35] More importantly, however, as previously noted, Senator Bayh's first Title IX proposal contained an institutional rather than program specific approach and would have applied to "any" program or activity of an educational institution receiving federal funds. Had the Senate adopted such an institutional approach, then there might be some justification for HEW's

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[34] *See* 110 Cong. Rec. at 1518-19, 21 (remarks of Rep. Celler; *id.* at 1542 (remarks of Rep. Lindsay); *id.* at 1602 (remarks of Rep. Mathias); *id.* at 2480-81 (remarks of Rep. Ryan); *id.* at 6545 (remarks of Sen. Humphrey); and *id.* at 7060 (remarks of Sen. Pastore).

[35] *See, e.g., House Title IX Hearings* at 645-61 (Testimony of Dr. Peter Muirhead on behalf of HEW).

regulations. In revising his bill to conform to the House version of Title IX, however, Senator Bayh narrowed his proposal so as to adopt the program specific language found in Title VI and the House bill.

In the context of federal education statutes, therefore, it is clear that Title IX does not regulate the employment policies of recipients unless its employees are intended beneficiaries. "Beneficiaries" of Title I of the Elementary and Secondary Education Act of 1964, 20 U.S.C. § 241 a-m, for example—the largest program of federal assistance below the college level—are disadvantaged children.[36] Teachers, guidance counselors, or janitors, on the other hand, are not the intended beneficiaries of such programs but are simply employed to make available the federally financed benefits.[37] Indeed, regulation of general employment practices is inherently nonprogram specific because employment practices cut across programs receiving federal assistance and those which do not.

B. The Pinpoint Termination Provision in Section 902 Confirms the Program Specific Scope of Section 901.

By adopting the identical administrative scheme for terminating federal financial assistance under Title IX as under Title VI, Congress made a conscious decision to limit enforcement of Section 901 to the particular education "program or activity [of] any recipient" with termination of federal funds "limited to the particular political entity, or part thereof," if in fact there was discrimi-

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[36] Title I provides that payments made shall be "only for programs and projects . . . designed to meet the special educational needs of [disadvantaged] children." 20 U.S.C. § 241(c). Virtually every grant statute uses "program" or "activity" to describe the basis of the authorization.

[37] As noted previously (see p. 16 & n.28, *supra*), Congress rejected an amendment of Title IX by Senator McGovern which would have applied it to "employment *in connection with* any program or activity associated under the Act." 117 Cong. Rec. 30411 (emphasis added). *Compare* Attorney General Kennedy's more limited interpretation of Section 601 of Title VI at p. 9, *supra*.

nation to intended beneficiaries of such programs or activities. 20 U.S.C. § 1682. Thus, federal assistance to program "A" cannot be terminated because of a finding of discrimination in program "B". As a corollary, a remedy for the aggrieved is not available unless the complainant participated in a program which received federal assistance and was the intended beneficiary of that assistance.

HEW's employment regulations under Title IX, 45 C.F.R. Part 86, Subpart E, however, turn the statute around. As was well-stated by the trial court in *Seattle University v. HEW*:

> Under HEW's Title IX employment regulations, the threshold question is whether an educational institution is merely a recipient of federal funds. If the institution receives any federal funds—even a single program—then HEW can, in its view, regulate all employment practices in all educational programs operated by the institution. This interpretation is erroneous.

16 FEP Cases at 721, *aff'd*, 621 F.2d 992 (9th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3409 (U.S. 1980) (No. 80-493). Thus, inconsistent with the plain meaning of the words used in Section 902 and its legislative history, HEW's employment regulations broadly cut across all programs of a recipient institution irrespective of whether the particular program was supported by federal funds.

This interpretation of the meaning of the language in Section 902—Title IX's enforcement provision—is supported by the legislative history of the identical provision found in Title VI.[38] During the Congressional hearings on the 1964 Civil Rights Act, the question frequently arose as to whether assistance to one program could be cut off because of a finding of discrimination in another. The Administration's cabinet-level representatives con-

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[38] *See* Kuhn, *Title IX: Employment and Athletics Are Outside HEW's Jurisdiction*, 65 Geo. L. J. 49, 50-54, 65-67 (1976).

sistent answer was that it could not.[39] A reading of the floor debates on Title VI in both Houses, moreover, reinforces the conclusion that under no circumstances would discrimination in one program justify action with respect to any other program.

During House debate on H.R. 7152, the enforcement authority of Title VI was not completely understood. To clarify the situation, Congressman Mathias brought to his colleagues attention Attorney General Kennedy's assurance during committee hearings that any termination of assistance would be "as specific and particular as it possibly could be" and he highlighted that this certainly was the understanding of the members of the Committee in working on the bill.[40]

When the House bill, H.R. 7152 reached the Senate, the Senate floor leader for Title VI emphasized that "[p]articipation in one program would not justify the exaction of a non-discrimination assurance concerning some other program."[41] Similarly, Senator Ribicoff, one of the two authors of the version of Title VI passed by the House, pointed out that "[u]nder no circumstances" would discrimination in one program justify any action with respect to any other program.[42] These repeated assurances that assistance in one program could not be terminated because of a finding of discrimination in another program were made prior to the inclusion in

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[39] *See Hearings on Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary*, ser. 4, pt. II, 88th Cong., 1st Sess. (1963) at 1543 (colloquy between Representative Meader and HEW Secretary Celebreeze that the withholding of funds from one program cannot be used as a means of combatting discrimination in another program); *Hearings on H.R. 7152, as amended by Subcomm. No. 5, Before the House Comm. on the Judiciary*, ser. 4, pt. IV, 88th Cong., 1st Sess. (1963) at 2685, 2766. Attorney General Kennedy indicated that the termination of assistance be limited to the particular program and location where the discrimination exists.

[40] 110 Cong. Rec. 2486 (1964) (remarks of Rep. Mathias).

[41] *Id.* at 7059 (remarks of Sen. Pastore).

[42] *Id.* at 7067 (remarks of Sen. Ribicoff).

Title VI of the pinpoint termination provision found in Section 602, 42 U.S.C. § 2000d-1, which limits any termination of federal assistance to the "particular program, or part thereof," in which the discrimination is found.

When the final version of the 1964 Civil Rights Act was proposed in the Senate, in the form of the Dirksen-Mansfield substitute, Title VI contained the program specific provision. As explained in the Senate debates, "[t]he new language will ensure that Federal funds will be cut off for only those political entities or particular programs or parts of programs in which discrimination is practiced."[43] Moreover, Senator Humphrey, floor leader for the Civil Rights Act, stated that the revisions clarified that "any termination shall affect only the particular program, or part thereof," in which discrimination occurs and such termination "will be restricted to the particular subdivision" in which discrimination is found.[44] Finally, House Judiciary Chairman Celler confirmed Senator Humphrey's interpretation when he appeared before the House Rules Committee to describe the Senate amendments to the bill, stating that "aid to a particular program, will not be cut off because one part of the program or institution is being operated in violation of the law."[45]

The legislative history of Title VI makes clear, therefore, what is evident from the statutory language—federal assistance in one program cannot be terminated because of a finding of discrimination in another program. There is, moreover, no remedy available unless the complainant was the intended beneficiary of that assistance. *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d at 674-76 & n. 4.[46] Irrespective of the presence of "Sec-

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[43] *Id.* at 12689 (remarks of Sen. Saltonstall).

[44] *Id.* at 12714-15 (remarks of Sen. Humphrey). See also *id.* at 13377 (remarks of Sen. Ribicoff).

[45] *Hearing on H. Res. 789 Before the House Comm. on Rules*, 88th Cong., 2d Sess. (1964) at 6.

[46] *See also Simpson*, 629 F.2d at 1233 n. 12; and *Trageser*, 590 F.2d at 89.

tion 604" language, these Title VI standards apply to Title IX. Although Senator Bayh's first proposal adopted an institutional rather than pinpoint termination procedure,[47] his second proposal adopted the House bill's Section 902 language.[48] In doing so, Senator Bayh incorporated the pinpoint termination procedure found in Section 602 of Title VI.

Accordingly, in adopting Section 902 as the mirror image of Section 602, Congress made a conscious decision to limit enforcement of Section 901 to the particular educational "program or activity" receiving federal funds. This means, for example, that Title I funds can only be terminated if there is discrimination in a Title I program, and only to that part of the educational institution in which the discrimination occurred. Moreover, federal assistance to a Title I program cannot be terminated because of discrimination in a program funded under the Vocational Education Act, 20 U.S.C. §§ 1241-1391.

But under HEW's employment regulations, only if an educational institution is completely self-supporting—receiving no federal assistance—would it be exempt from HEW's employment regulations. Derivatively, every program of a school district or university program would be covered by Title IX if only one is federally funded. Such a result is not justifiable in view of the program specific scope of Section 901 and the pinpoint termination provisions in Section 902. Thus, HEW's investigation of employment discrimination complaints under Title IX has been inconsistent with the program specific and pinpoint termination provisions of Title IX. In none of the Title IX employment cases has HEW attempted to determine whether there has been discrimination against intended beneficiaries of federal funds or indeed whether the complainant is an intended beneficiary. Moreover, HEW's institutional view of federal assistance has caused them to conduct investigations of employment practices beyond

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[47] *See* 117 Cong. Rec. 30408 (1971) (colloquy between Senators Dominick and Bayh).

[48] See p. 17, *supra*.

the parameters of a particular program. Accordingly, when HEW has found noncompliance in employment practices, it has sought to terminate all federal funds in all programs irrespective of any finding of discrimination of intended beneficiaries and irrespective of that part of the educational institution in which the discrimination occurred.

The policies underlying Title IX, however, call for a more limited application of its authority under Title IX. Before an investigation can be initiated, the program specific scope of Title IX requires that HEW ascertain that the complainant employee is an intended beneficiary. Because Title IX is designed to protect intended beneficiaries, moreover, the purposes of the statute are not furthered by an investigation broader than that within the program in which the discrimination has occurred. In any event, to the extent that the recipient is found to have discriminated against an intended beneficiary but does not take corrective action, termination of funding proceedings are limited to the program in which HEW finds noncompliance. To use procedures other than these violates the program specific scope and pinpoint termination procedures of Title IX.

III. THE DEPARTMENT OF EDUCATION'S RELIANCE ON AN INFECTION DOCTRINE TO JUSTIFY ITS EMPLOYMENT REGULATIONS IS NOT JUSTIFIED BY DECISIONAL AUTHORITY UNDER TITLE VI AND IS INCONSISTENT WITH THE LEGISLATIVE PURPOSES OF TITLE IX.

In the absence of direct statutory authority to regulate the employment practices of recipients under Title IX, HEW also relies on an "infection" doctrine to justify Subpart E, 45 C.F.R. Part 86. The theory, in essence, is that discrimination against nonbeneficiary employees has the effect of causing discrimination in the delivery of the benefits to intended beneficiaries (students).[49] During

[49] Because HEW's regulations create no jurisdictional prerequisite for a nexus to be established, the infection doctrine cannot serve as a justification for them. Indeed, in none of the Title

the Congressional oversight hearings on HEW's proposed Title IX regulations, Secretary of HEW Weinberger attempted to justify the "institutional" or "infection doctrine" approach HEW had taken to enforcement of Title IX by misconstruing *Board of Public Instruction of Taylor County v. Finch*, 414 F.2d 1068 (5th Cir. 1969), as supporting an "infection doctrine" under Title VI.[50] An analysis of *Finch*, however, leads to the opposite conclusion.

In *Finch*, the Fifth Circuit expressly rejected HEW's interpretation that the word "program" in Title VI did not refer to individual grant statutes, but to general categories such as entire school districts. Moreover, the court held that programs could not be condemned by association. The court refused "to assume, contrary to the express mandate of [the statute], that defects in one part of the school system automatically infect the whole." 414 F.2d at 1074. Thus, under the holding in *Finch*, funds under Title VI are not to be denied or terminated in a federally assisted program unless there is an express finding of discrimination in a particular program. *Accord, Gatreaux v. Romney*, 457 F.2d 124, 128 (7th Cir. 1972) (federal assistance to model cities program unrelated to housing cannot be terminated because of discrimination in a low-rent housing program).

At bottom, moreover, there is little to commend the infection doctrine in this case. The mere assertion of such a nexus between employment discrimination and the program beneficiaries as a predicate to investigation, is an insufficient basis for investigation of employment complaints. Under that standard, employment practices would *always* be subject to an investigation contravening

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IX employment cases was such a nexus established either as a prerequisite to conducting an investigation or prior to notice of HEW's intent to terminate funds.

[50] *Hearings on Sex Discrimination Regulations Before the Subcomm. on Post Secondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 484-85 (1975).

the program specific and pinpoint termination provisions of Title IX. Moreover, these isolated employment discrimination complaints relating to maternity leave and contract renewal do not affect the nondiscriminatory delivery of services to students. *See Sabol v. Board of Education of Willingboro*, 25 FEP Cases 548, 552 (D.N.J. 1980) (Facts alleging a solitary act of employment discrimination are insufficient to establish a pattern and practice of discrimination against students). Significantly, no student or other intended beneficiary has been joined in the complaint and HEW's investigations did not establish or seek to establish that the alleged employment discrimination caused discrimination against intended beneficiaries.

Whatever validity the infection theory may have rests upon an effort to protect intended beneficiaries from discrimination based on sex. But as the plain words of these regulations show, HEW does not consider itself under any obligation to establish discrimination against intended beneficiaries before enforcing the employment provisions of Subpart E. Because employees, not intended beneficiaries are the focus of HEW's regulations, those regulations exceed Title IX and are invalid.

CONCLUSION

The decision of the court of appeals should be reversed and this Court's opinion should make clear that Title IX is program specific and does not authorize the Department of Education to regulate recipient's employment practices unless its employees are intended beneficiaries of federal financial assistance.

Respectfully submitted,

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July 6, 1981